NSW Law Reform Commission

Report 84 (1997) - The Right to Support From Adjoining Land

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New South Wales Law Reform Commission

To the Honourable Jeff Shaw QC MLC
Attorney General for New South Wales

Dear Attorney

The right to support from adjoining land

We make this final Report pursuant to the reference to this Commission dated 27 September 1991.

Professor John Goldring
Commissioner

Justice David Hodgson
Commissioner

Mr Craig Kelly
Commissioner

Justice Mahla Pearlman AM
Commissioner

Professor Michael Tilbury
Commissioner

November 1997

Terms of reference

On 27 September 1991, the then Attorney General for New South Wales, the Honourable Peter Collins QC MP, made the following reference to the Commission:

To inquire into and report on:

1. *whether any changes should be made to the laws relating to the rights of adjoining land owners to support from adjacent land, including any buildings or structures; and*
2. *any related matters.*

Participants

The Law Reform Commission is constituted by the Law Reform Commission Act 1967 (NSW). For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

Professor Jack Goldring
Justice David Hodgson
*Mr Craig Kelly**
Justice Mahla Pearlman AM
Professor Michael Tilbury

(* denotes Commissioner-in-Charge)

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RECOMMENDATIONS

RECOMMENDATION 1 ***(page 50-51)***

The Commission recommends inserting into the *Conveyancing Act 1919* (NSW), and such other legislation as may be necessary, provisions giving effect to the following:

1. **The abolition of the right of any person to bring a common law action in nuisance in respect of a reduction in support for any land.**

2. **Everyone must take reasonable care that they do not do or omit to do anything on or in relation to land which might cause loss or damage by removing support provided by that land to other land.**

3. **For this purpose "land" includes the natural surface of the land, the subsoil and any subterranean water, and reclaimed land, but does not include man-made structures on that land, except to the extent that those structures replace the support provided by the supporting land in its natural state.**

4. **If those with interests in land agree among themselves to exclude, restrict or modify the duty of care, they may register that agreement in ways that bind their successors in title to the land by means of an "easement to remove support".**

RECOMMENDATION 2 ***(page 54)***

The Commission recommends that a provision be inserted into the *Local Government Act 1993* (NSW) stating that the breach of certain Regulations made pursuant, and listed in a Schedule, to the Act shall not give rise to any private right of action. It is further recommended that Regulations 33 and 34 of the *Local Government (Approvals) Regulation 1993* (NSW) be listed in the relevant Schedule.

1. Introduction

- The reference
- Discussion paper 27
- Problems with the law of support

THE REFERENCE

1.1 On 27 September 1991 the Commission received a reference from the then Attorney General, the Hon Peter Collins MP, to inquire into and report on:

1. whether any changes should be made to the laws relating to the rights of adjoining land owners to support from adjacent land, including any buildings or structures; and
2. any related matter.

1.2 The reference followed receipt by the Commission of a memorandum from Justice Giles, on behalf of the judges of the Commercial Division of the Supreme Court of New South Wales, drawing attention to the unsatisfactory state of the law relating to the removal of support of land. The Commission released a Discussion Paper in 1992 ("DP 27"),[1] which put forward some reform options, and invited public comment.

1.3 Submissions[2] were received from organisations and individuals, all of which agreed that the law of support was in need of reform. However, because of the priority which the Commission found necessary to accord to other references, preparation of a Report was postponed. In the intervening period the *Local Government Act* 1993 (NSW) was passed. The relevant regulations[3] contained within the *Local Government (Approvals) Regulation* 1993, made pursuant to the new Act, have retained the substance of their predecessor, and so have not altered any statutory right to support. This is discussed in greater detail in Chapter 2. Likewise, there have been no substantive developments in the common law since the publication of DP 27.

DISCUSSION PAPER 27

1.4 In its Discussion Paper, the Commission proposed two options for consideration:

1. New South Wales Law Reform Commission, *The Right to Support by Adjoining Land* (Discussion Paper 27, 1992).
2. Appendix A contains a list of submissions received.
3. See para 2.9.

1. amendment of Part 31.4 of Ordinance 70, *Local Government Act 1919* (NSW) (superseded by Regulation 34, *Local Government (Approvals) Regulation 1993*); and

2. the introduction to the *Real Property Act 1900* (NSW) of a provision similar to s 179 of the *Property Law Act 1974* (Qld).

1.5 All submissions agreed that the law in this area is deficient, and favoured legislative reform broadly in line with the Commission's proposals.

PROBLEMS WITH THE LAW OF SUPPORT

1.6 The existing situation is unsatisfactory on several grounds. These are summarised below and discussed in greater detail in chapters 2 and 3.

Common law unsuited to modern conditions

1.7 The common law principles on which the right to support is based were laid down in a nineteenth century English case.[4] They are based on quite narrow proprietary rights, having little relevance to the reality of modern urban conditions, and were formulated prior to the Torrens system of land title registration and major developments this century in the law of negligence. The protection afforded by common law seems today to be narrow and arbitrary. There have been calls by the judiciary, academics and other commentators that, should the opportunity arise, the High Court depart from these outdated principles.[5]

Legislative intervention piecemeal and unsatisfactory

1.8 Some statutory protection for adjoining landowners does exist, but pertains to quite specific situations.[6] There is, therefore, no legislation having comprehensive application, again leaving this area of the law open to the criticism that the protection it provides is patchy and arbitrary.

Anomalies in application of the law

4. *Dalton v Henry Angus & Co* (1881) 6 App Cas 740.
5. See for example para 3.24.
6. See paras 2.9-2.12.

1.9 Partly as a result of the problems referred to in the two previous paragraphs, anomalies arise in the application of the law with respect to where the burden of liability should lie. The consequences that can follow are that the victim has insufficient redress, that an innocent actor can be unjustly burdened, and that an actor whom the Commission believes ought to bear the burden escapes liability.

RECOMMENDATIONS

1.10 In summary, the Commission has five recommendations:

1. That the law of nuisance in relation to actions for withdrawal of support should be abolished.

2. That the law regulating the rights of owners and users of one piece of land to continue to enjoy the support of that land from other land be governed by the ordinary principles of negligence.

3. That a right to support of land from natural water bodies and reclaimed land be created and regulated in the same manner as the right to support of land from other land.

4. That a new type of easement, an easement for removal of support, be created.

5. That breach of certain regulations made pursuant to the *Local Government Act 1993* (NSW) shall not give rise to any private right of action.

1.11 The recommendations are contained within draft legislation attached as Appendix B to this Report.

2. The law of support in New South Wales

- Right to support from adjoining land
- Right to support of a building by a building
- Statutory right to support of an adjoining building
- Right to support by water

RIGHT TO SUPPORT FROM ADJOINING LAND

Support to land

2.1 According to common law, the right to the support of land in its natural state is an incident of the land itself. It is a "natural right", not an easement or grant, evolving from a recognition that land in its natural state requires support from adjacent soil, and the notion that a landowner has a right to the enjoyment of his or her own property.[1] This right does not, however, entitle the landowner to insist that the adjoining land remain in a natural state.

2.2 Where the owner's land subsides due to excavation or other activity on the adjoining land, he or she can bring an action for damages in nuisance against the adjoining landowner, provided that the owner can establish that his or her land would have subsided without the weight of any building erected on the owner's land.[2] In some cases it may be appropriate to seek an injunction to prevent further work being undertaken, and, in some circumstances, a court may grant a *quia timet* injunction to prevent the commencement of work which poses a serious risk of the nuisance occurring and leading to irreparable damage.[3] The Court also has jurisdiction to award equitable damages in addition to, or in substitution for, an injunction to restrain a threatened nuisance.[4]

Support to buildings

2.3

> [I]t is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent

1. *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 at 791.
2. *Dalton v Henry Angus & Co* (1881) 6 App Cas 740; *Pantalone v Alaouie* (1989) 18 NSWLR 119.
3. J G Fleming *The Law of Torts* (8th ed, Law Book Co, Sydney, 1992) at 446. See also *Hooper v Rogers* [1975] 1 Ch 43; *Grasso v Love* [1980] VR 163 (FC).
4. *Supreme Court Act 1970* (NSW) s 68, paralleling the *Chancery Amendment Act 1858* (*Lord Cairns' Act*); *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851; *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245.

> soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground.[5]

As these words of Lord Penzance attest, there is no obligation at common law to support buildings erected on adjoining land, unless specifically provided for by grant or prescription. This is, however, subject to the qualification that where land subsides due to a loss of support, and not from the additional weight of buildings thereon, the landowner is entitled to recover damages for injury to the building in addition to damages for the land subsidence.[6]

2.4 There is uncertainty as to what kinds of improvements will be deemed to alter the natural state of land, so that it forfeits its natural right to support. In a recent case in this State, *Xuereb v Viola*,[7] it fell to be decided, inter alia, whether the wall of an earth dam on the plaintiff's property should be considered to be a building, and thus not entitled to have its load supported by the adjoining land. Justice Giles found that both the dam wall and the dam itself *were* in the same position as a building:

> because they are a man-made construction changing the natural ground, and changing the distribution of loads upon and through the natural ground by the imposition of an additional load on the ground on which the dam is constructed. The natural right of support is a right to the support of land in its natural state, not to land in a state where the loads upon the adjoining land have been altered. The alteration may be by a wall or by filling, and in my view may also be by the construction of a dam. (Nice questions could arise upon what the natural state of land is - does a time come when a man-made construction, at least one by way of earthworks, becomes the natural state of the land? No such question arises in the present case.)[8]

Prescription or grant

2.5 The rule in *Dalton v Henry Angus & Co*[9] (hereinafter referred to as *Dalton*) will not apply where a right to support is acquired by easement. That

5. *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 at 804, per Lord Penzance.
6. *Brown v Robins* (1859) 4 H & N 186, 157 ER 809; *Stroyan v Knowles* (1861) 6 H & N 454; 158 ER 186; *Public Trustee v Hermann* (1968) 88 WN (Pt 1) (NSW) 442.
7. (1990) Australian Torts Reports 67,667.
8. (1990) Australian Torts Reports 67,667 at 67,684.
9. *Dalton v Henry Angus & Co* (1881) 6 App Cas 740.

case referred to the distinction between the natural right to support of land and the right, "founded upon prescription or grant, express or implied", to support of buildings. According to Lord Selborne "the right ... is properly called an easement".[10] In theory, therefore, an easement of support can be created by three methods:

- express grant or reservation;
- implied grant or reservation; or
- prescription.

If the first of these methods is employed, and the easement is registered on title, then the neighbouring building is clearly entitled to support. Doubts arise, however, regarding the second and third methods. As they are not created by written instruments they are not registrable, and therefore contrary to the purpose and functioning of the *Real Property Act 1900* (NSW) ("RPA"), at whose core is the principle that the Register be conclusive as to title. Section 42 of the RPA gives the registered proprietor title to land free of any unrecorded interests, subject to specific exceptions. Notwithstanding s 42, an implied easement may be said to have been created where, for example, a personal right is enforceable against the registered proprietor. However, such a right will not be enforceable against a successor in title to the registered proprietor.[11]

2.6 As for easements by prescription, these are acquired by uninterrupted enjoyment of a right over a period of twenty years. In *Kostis v Devitt*[12] the Supreme Court of New South Wales stated that the scheme of the RPA does not permit the creation or acquisition of easements otherwise than in the manner provided by s 46 and s 47. In *Dewhirst v Edwards*[13] it was held that, with the exception of a prescriptive easement in existence prior to the land being brought under the RPA but omitted from the Register on registration, the RPA does not recognise the existence of easements claimed to have been acquired merely by effluxion of time.

2.7 It would appear that easements arising by implication or prescription have little, if any, application in respect of Torrens title land, and therefore

10. *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 at 792.
11. *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618; *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738.
12. (1979) 1 Butterworths Property Reports 9231 at 9239.
13. [1983] 1 NSWLR 34.

are of little relevance in the majority of cases where a building is damaged through loss of support from adjoining land. Thus, to the extent that these exceptions may have provided some limited relief to the rule in *Dalton*, they have been rendered almost obsolete by the enactment of the RPA.[14]

RIGHT TO SUPPORT OF A BUILDING BY A BUILDING

2.8 There is no natural right for a building to be supported by an adjoining building. An easement can be created to provide such protection, and in practice there would be few instances where this did not exist. In the absence of such an easement, however, the position at common law is that a landowner is under no obligation to prevent withdrawal of support through, for example, shoring or underpinning.

STATUTORY RIGHT TO SUPPORT OF AN ADJOINING BUILDING

2.9 Regulation 34 of the Local Government (Approvals) Regulation 1993 has retained similar wording to Pt 31.4 of Ordinance 70 (made pursuant to s 318 (7) of the Local Government Act 1919 (NSW)).[15] However, reg 34 contains one important difference to Pt 31.4. Instead of imposing the obligation directly, reg 34 operates by importing its provisions into the terms of any approval to erect a building granted under the Local Government Act 1993 (NSW). It states:

> 34 (1) It is a condition of an approval to erect a building that, if an excavation extends below the level of the base of the footings of a building on an adjoining allotment of land, the person causing the excavation to be made must comply with this clause.
>
> (2) The person must at the person's own expense:
> (a) preserve and protect the building from damage; and
> (b) if necessary, underpin and support the building in an approved manner.

14. See also *Conveyancing Act* 1919 (NSW) s 181B which provides for mutual cross-easements of support in the case of party walls.
15. Discussed in DP 27 at para 3.8 and following.

> (3) The person must, at least 7 days before excavating below the level of the base of the footings of a building on an adjoining allotment of land, give notice of intention to do so to the owner of the adjoining allotment of land and furnish particulars to the owner of the proposed work.
>
> (4) In this clause, **allotment of land** includes a public road and any other public place.

2.10 In addition, reg 33 provides that it is a condition of an approval to erect a building that if the soil conditions so require, retaining walls or other approved methods of preventing soil movement must be provided, and adequate provision must be made for drainage. Failure to comply with the terms of an approval:

1. is an offence under s 627 of the *Local Government Act 1993* (NSW), which carries a maximum penalty of 50 units for individuals and 100 for corporations, one penalty unit being $110;[16] and

2. is a breach of the *Local Government Act 1993* (NSW) which may be remedied or restrained by the courts on the application of any person (see sections 673 and 674).

2.11 As to the meaning of "the person causing the excavation to be made" Justice Giles observed in *Pantalone v Alaouie* [17] that Pt 31.4 was not intended to give rise to multiple liability, but rather that liability was intended to attach to the person in the position to give seven days notice of the intention to excavate, as required by that part. The imposition of the obligations in Regs 33 and 34 as conditions of approvals under the *Local Government Act 1993* (NSW) is consistent with this construction.

2.12 Submissions received by the Commission following publication of DP 27 highlight two obstacles which limit the application of Pt 31.4. These obstacles, which would apply equally to reg 34, are:

1. The qualification contained in both Pt 31.4 and reg 34 that the excavation "extends below the level of the base of the footings of a

16. *Interpretation Act 1987* (NSW) s 56 (as amended by *Statute Law (Miscellaneous Provisions) Act 1997*, Sch 1.11).
17. (1989) 18 NSWLR 119 at 131.

building on an adjoining allotment of land", rather than to *any* excavation, regardless of depth.

2. Regulation 34 applying only to excavations which require lodgment of a building application. While in practice this will catch most excavations, it is nevertheless not comprehensive. A landowner could, for example, dig a large hole on his or her land for which no building application is required, which removes support sufficient to cause damage to a structure on adjoining land.

RIGHT TO SUPPORT BY WATER

2.13 There is no natural right to support of land by water. Early English cases, such as *Chasemore v Richards*,[18] established the right of an adjoining landowner to use the land, including water percolating below it in an undefined channel, as he or she wished, regardless of the consequences to neighbouring land. Later decisions reaffirmed this right,[19] and held further that the landowner could not be said to owe a duty of care when exercising that right. As a result, an aggrieved neighbour could not sue in either nuisance or negligence. In *Stephens v Anglian Water Authority*[20], the English Court of Appeal cited with approval the conclusion reached by Justice Plowman, the judge at first instance, in *Langbrook Properties Ltd v Surrey County Council*, who had stated as follows:

> The authorities cited on behalf of the defendants in my judgment establish that a man may abstract the water under his land which percolates in undefined channels to whatever extent he pleases, notwithstanding that this may result in the abstraction of water percolating under the land of his neighbour and, thereby, cause him injury. In such circumstances the principle of sic utere tuo ut alienum non laedus does not operate and the damage is damnum sine injuria. Is there any room for the law of nuisance or negligence to operate? In my judgment there is not.[21]

18. (1859) 7 HL Cas 349;11 ER 140; see also *Acton v Blundell* (1843) 12 M & W 324;152 ER 1223.
19. *Langbrook Properties Ltd v Surrey County Council* [1969] 3 All ER 1424; *Stephens v Anglian Water Authority* [1987] 3 All ER 379.
20. [1987] 3 All ER 379 at 381.
21. [1969] 3 All ER 1424 at 1439-1440.

Judicial comment in these cases reveals dissatisfaction with the existing law.[22]

2.14 An exception may exist where a statutory authority, and not the landowner, removes the support of water, leading to damage to adjoining land. In *The Mayor, Councillors and Citizens of Perth v Halle*[23] the Municipality of Perth, authorised by the *Municipalities Act 1906* (WA),constructed a stormwater drain in a public street. By virtue of the same Act, absolute property in the streets of Perth was vested in the municipality. Because of negligent construction, holes developed in the drain, through which passed quantities of sand and water from the plaintiff's land adjoining. This reduced support to the plaintiff's land, resulting in subsidence and damage to two houses. Because of its negligence the Council was held to have acted outside its statutory authority, which extended only to proper execution and maintenance of the work, and thus to have created a nuisance. Counsel for the defendant had attempted to argue that the plaintiff was not entitled to a right of support from water underlying his land. Justice O'Connor responded as follows:

> The true position of the landowner in my opinion is this: - He is entitled to have his land supported by the underground water which naturally underlies it. That right is one of the incidents arising out of his ownership, and, unless it is taken away by Statute, he can assert it against all the world except the adjoining owner. Even the latter is entitled to interfere with the full enjoyment of the right only when the lawful use of his own land necessarily involves that interference. But, as against every person other than the adjoining landowner, he has the same remedy for the protection of this, as he has for the protection of any other, right arising out of his ownership. The municipality in this case had not, as I have pointed out, either the rights of a private owner or the authority of a Statute to justify what they have done. Their position was and is no other than that of any public body which, having charge of a public street, has by negligent, and therefore unauthorised, work in the street injuriously affected the right of an adjoining owner to his special damage. The construction and maintenance of the drain under these circumstances is a nuisance, actionable at the suit of a party injured.[24]

22. See *Stephens v Anglian Water Authority* [1987] 3 All ER 379 at 383-384; *Langbrook Properties Ltd v Surrey County Council* [1969] 3 All ER 1424 at 1440.
23. (1911) 13 CLR 393 (HC).
24. (1911) 13 CLR 393 at 414.

2.15 In *Metropolitan Water Supply and Sewerage Board v R Jackson Ltd*[25], the appellant Board was held liable for damage to the plaintiff's building occasioned by withdrawing the support of water from adjoining land in the course of constructing a sewer. The Full Court of the Queensland Supreme Court rejected the Board's contention that it was in the position of an owner. The Court held that the Board's powers to construct sewers in the streets were independent powers conferred directly by the legislature to do certain acts, and not exercised by the Board as a delegate or licensee of the Crown, nor derived from the Crown's ownership of the soil. The Board was not an owner, nor acting by consent of the owner, but merely exercising statutory powers.[26] It appears, therefore, that even where property is vested in statutory authorities, the latter are not, in this context, regarded as being in the position of an adjoining landowner, and may, therefore, be liable in negligence and nuisance.

25. [1924] QSR 82.
26. [1924] QSR 82 at 100-101.

3. Issues

- Nuisance
- Breach of statutory duty
- The rule in Dalton v Angus
- Negligence
- Liability for independent contractors

NUISANCE

3.1 As stated in the previous chapter, where a common law right of support has been infringed and has caused damage, an action will lie in nuisance.

The trouble with nuisance

3.2 Winfield described private nuisance as "an unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with, it",[1] although he had prefaced this with the comment that it is not a term capable of exact definition. As numerous writers have suggested, nuisance is an area rife with confusion. It has been called, inter alia, a tort of "mongrel origins",[2] "immersed in undefined uncertainty",[3] and accused of lacking definition and any coherent goals or purpose.[4] It has, it is said, become "so amorphous as well nigh to defy rational exposition",[5] being the common link between such diverse abominations as bad smells, crowing roosters, faulty cellar flaps and, of course, loss of support.

3.3 The student interested in the tort's pedigree will find, even allowing for the customary difficulty in tracing "the threads of modern causes of action back into the tangled ball which was the early common law", that "the nature of the origins of nuisance remains somewhat enigmatic".[6] Duly warned off, the Commission feels it would serve little purpose to attempt charting the tort's murky past. Rather, we shall confine ourselves to questioning some accepted notions regarding the tort of nuisance, and its suitability to support cases.

A tort of strict liability?

1. P H Winfield "Nuisance as a Tort" (1931) 4 *Cambridge Law Journal* 189 at 190.
2. F H Newark "The Boundaries of Nuisance" (1949) 65 *Law Quarterly Review* 480 at 480.
3. *Brand v Hammersmith & City Ry Co* (1867) LR 2 QB 223 at 247 per Erle CJ.
4. C Gearty "The Place of Private Nuisance in a Modern Law of Torts" (1989) 48 *Cambridge Law Journal* 214 at 215.
5. J G Fleming *The Law of Torts* (8th ed, Law Book Co, Sydney, 1992) at 409.
6. B Bilson *The Canadian Law of Nuisance* (Butterworths, Toronto, 1991) at 1.

3.4 There is judicial authority for the proposition that the withdrawal of lateral support from land is an actionable nuisance for which strict liability attaches without proof of any negligence.[7] Strict liability is generally understood as the imposition of liability for damage or injury, without the need for the plaintiff to prove that the defendant intentionally or negligently caused this result.

3.5 In recent decades a number of writers have made comments on the general concept of strict liability, the flavour of which is succinctly conveyed by the title of an article by Winfield, "The Myth of Absolute Liability".[8] With respect to "the modern theory that a medieval man generally acted at his peril" the learned author states:

> Generally, it [the phrase] means that whatever a man does will, if it injures someone else, make the doer guilty of a breach of law. To put it quite plainly, he is liable for every conceivable harm which he inflicts on another. Such a proposition is merely ridiculous. Life would not be worth living on such terms. Life never has been lived on such terms in any age or in any country.[9]

C H S Fifoot writes:

> Academic conflict has most frequently raged around the suggestion that English law began with a doctrine, or, if the word be too strong, with a sentiment of strict or even absolute liability, which gradually, as if in obedience to some occult influence, mellowed into the correspondence of fault and compensation agreeable to nineteenth-century liberalism. Holmes, indeed, thought the story too simple to be true. He doubted whether the Common Law ever had a rule of absolute responsibility ...
>
> It is not unfair to conclude that the evidence, fragmentary as it is, confirms Holmes in denying any initial premise of strict liability ... The prevailing tenor of judicial opinion in the first half of the nineteenth century, as far as so impalpable a phenomenon may be analysed, would

7. *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 at 791; *Fennell v Robson Excavations Pty Ltd* [1977] 2 NSWLR 486 at 493; *Pantalone v Alaouie* (1989) 18 NSWLR 119 at 129.
8. P H Winfield (1926) 42 *Law Quarterly Review* 37.
9. Winfield (1926) at 37-38.

> seem to favour rather than to reject the presence of fault as a necessary element of liability both in Trespass and in Case.[10]

3.6 The foregoing casts doubt on whether strict liability ever really applied at common law, at least in the sense of liability imposed without proof of fault. If strict liability did apply, then it was not immune from development. With specific reference to nuisance, Fleming writes:

> From its medieval origin stems an aura of strict liability, but the pervasive fault doctrine no more by-passed the law of nuisance during the 19th century than it did trespass. Thus although there is a regrettably lingering disposition to assume that once a condition has been labelled a nuisance there is nothing more to be said about liability, the law long ago compelled us to a more discriminating analysis. True, it is apparently for the defendant to exculpate himself (in contrast to negligence); but in most situations there is no longer any liability without some measure of fault, while in others more exacting standards have prevailed in response to modern policy demands for public safety.[11]

3.7 In *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))*,[12] on appeal from the Supreme Court of New South Wales, the Privy Council held that creating a danger to persons or property in navigable waters fell in the class of nuisance in which foreseeability was an essential element in determining liability. Lord Reid stated:

> It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none. ... It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense unforeseeable.[13]

10. C H S Fifoot *History and Sources of the Common Law* (Stevens & Sons, London, 1949) at 187 and 194.
11. John G Fleming *The Law of Torts* (8th ed, Law Book Co, Sydney, 1992) at 427.
12. [1967] 1 AC 617.
13. [1967] 1 AC 617 at 640.

3.8 Individual cases, such as the one just mentioned, have not, however, clarified the position with respect to the applicability of strict liability to nuisance. As R W M Dias comments:

> The dicta are confusing. Lord Wright once said: "The liability for a nuisance is not, at least in modern law, a strict or absolute liability" [*Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 904]. On the other hand, Lord Simonds has said: "For, if a man commits legal nuisance, it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict, and there only he has a lawful claim who has suffered an invasion of some proprietary or other interest in land" [*Read v J Lyons & Co Ltd* [1947] AC 156 at 183]. Lord Reid has now said: "And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability" [*Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617 at 639].[14]

3.9 This confusion has caused much second-guessing as to the definition and application of "strict liability":

> ... "strict" liability then quite simply means ... that the probative onus passes to the defendant, it being for him to persuade judge and jury that he took all the precautions the situation demands.[15]

> In nuisance the position is, not that there need be no foreseeability of interference at all, but that there need be no foreseeability of an unreasonable degree of interference, which is the "event" constituting nuisance. It is this difference, perhaps, that Lord Wright contemplated when he said that nuisance is not strict [in *Sedleigh-Denfield v O'Callaghan*]. On the other hand, nuisance is stricter than negligence, since the taking of reasonable care to ensure that the interference shall not get out of hand is no defence; and this may be what Lord Simonds meant when he said that nuisance is strict [in *Read v J Lyons & Co Ltd*]. Is there any form of nuisance which is truly strict? The only one is the dubious case of the collapse of artificial structures on to the

14. R W M Dias "Trouble on Oiled Waters: Problems of *The Wagon Mound (No 2)* " (1967) 25 *Cambridge Law Journal* 62 at 80.
15. S Stoljar "Concerning strict liability", paper presented at the *Australian National University Tort Seminar* (Canberra, May 1988) at 13.

> highway, supported by *Wringe v Cohen* [[1940] 1 KB 229], on which the Board [in *The Wagon Mound (No 2)*] reserved its opinion.[16]
>
> [I]t must be admitted that where *Wringe v Cohen* applies the liability is certainly stricter than liability for negligence ... , but it is questionable whether there are now any other instances of strict liability for nuisance which cannot be explained as coming under *Rylands v Fletcher* or liability for the fault of independent contractors. ... It has been suggested that the true position is this: Liability for nuisance is strict in the sense that it is no defence for the creator of a nuisance to assert that he took all reasonable care to prevent it arising; but it is based on fault in the sense that he will not be liable where he could not reasonably have foreseen the kind of damage which might result and the way in which it might arise if he failed to use reasonable care.[17]
>
> It would seem to follow [from *The Wagon Mound (No 2)*] that one cannot be liable for nuisance at all unless and until some injury is foreseeable. Any contrary position, moreover, would have competed invidiously with the principle of *Rylands v Fletcher*, by drawing within the orbit of strict liability all manner of perfectly "normal" activities, fraught with no more than the common level of risks. The only serious bid for exceptional treatment seems to be on behalf of certain rights appurtenant to land, like the right of natural support. These property rights, though traditionally protected by actions for nuisance, are outside the ordinary regime of nuisance at least in being treated as absolute (like the protection afforded by trespass against intrusions) rather than qualified by considerations of reciprocal reasonableness. It may just be therefore that they are also entitled to absolute protection against defendants who had no reason to anticipate an infringement, as when excavations cause a wholly unexpectable weakening of lateral support next door.[18]

Disadvantages of a strict liability regime

3.10 As the foregoing attests, the meaning of strict liability is unsettled. This is due in part to the evolving nature of the law in this area, as it seeks to adjust to developments in the law of negligence. Even the rule in *Rylands v Fletcher*, virtually a byword for the concept of strict liability, is not immune.

16. R W M Dias at 81.
17. England and Wales, Law Commission *Civil Liability for Dangerous Things and Activities* (Report 32, 1970) at 24-26.
18. Fleming at 428.

A majority of the High Court recently held that this rule "should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence".[19] Nevertheless, courts feel bound to endeavour enforcing such a regime. In the process, defendants may be burdened with liability out of measure with ordinary, non-legalistic notions of fault.

3.11 The decision in *The Wagon Mound (No 2)* was applied in a recent case before the House of Lords, *Cambridge Water Co v Eastern Counties Leather Plc*.[20] The facts in that case were that the defendant, a leather manufacturer, used at its tannery a solvent which seeped into the ground and was conveyed in percolating water to the plaintiff's borehole 1.3 miles away, contaminating the water and rendering it unfit for human consumption. The plaintiff brought an action for damages in negligence, nuisance, and the rule in *Rylands v Fletcher*. At trial, the action was dismissed because, on the first two grounds, the defendants could not reasonably have foreseen that such damage would occur, and on the third ground because use of the solvent was held to constitute a natural use of the defendant's land. The matter next went to the Court of Appeal, the plaintiff appealing, successfully, against the dismissal of the cause of action based on the rule in *Rylands v Fletcher*. The appeal was upheld, not on the basis of that rule, but on the holding that there was a parallel rule of strict liability in nuisance, namely, where the nuisance was an interference with a natural right incident to ownership, the liability was a strict one. The defendant appealed to the House of Lords, which allowed the appeal. Their Lordships said that foreseeability of harm of the relevant type was a prerequisite for recovery both in nuisance and under the rule in *Rylands v Fletcher*. They held, contrary to the finding of the trial judge, that use of the solvent by the defendant constituted a non-natural use of the land. It was also held, however, that pollution of the plaintiff's water supply by the solvent was not foreseeable. Consequently the plaintiff's action failed. Lord Goff, delivering the judgment, stated:

> Of course, although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user - the principle of give and take as between neighbouring occupiers of land ... The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not

19. *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 556.
20. [1994] 2 AC 264.

> reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it.
>
> ... We are concerned with the liability of a person where a nuisance has been created by one for whose actions he is responsible. Here ... it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past 60 years points strongly towards a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance, as it is of liability in negligence. *For if a plaintiff is in ordinary circumstances only able to claim damages in respect of personal injuries where he can prove such foreseeability on the part of the defendant, it is difficult to see why, in common justice, he should be in a stronger position to claim damages for interference with the enjoyment of his land where the defendant was unable to foresee such damage.*[21] (emphasis added)

3.12 In a New South Wales case, *Fennell v Robson Excavations Pty Ltd*,[22] a developer employed the defendant excavator to remove soil from a property in Gosford, which it did in accordance with proper practice, leaving, in the words of the Court of Appeal, "a sound, stable bank of earth which presented no immediate threat to the plaintiffs' land, building and improvements".[23] The Court found that the excavator had acted entirely under the direction of the developer, and furthermore that the excavator had reasonable grounds for believing that the developer would erect a retaining wall which would protect the plaintiff's property from any future damage resulting from the excavation. In the event, however, the retaining wall was not built because the developer went into liquidation, and six months after the excavation work had been completed, following heavy rain, land across the plaintiffs' boundary subsided. The plaintiffs won judgment against the excavator for deprivation of support to their land. The defendant appealed on the grounds, inter alia, that:

21. [1994] 2 AC 264 at 299-300.
22. [1977] 2 NSWLR 486.
23. [1977] 2 NSWLR 486 at 489, per Glass JA.

1. the excavator was not in possession or occupation of the property where the excavation was carried out, and therefore could not incur liability for private nuisance;

2. when the excavation work was complete, the danger of subsidence was potential only, and no damage would have occurred had the retaining wall been built;

3. the developer's failure to build the retaining wall was a new act intervening, which made the plaintiffs' damage remote in law from the actions of the excavator; and

4. the damage and nuisance did not occur until after the excavator had left the site, and lost the power to abate the nuisance.

3.13 The appeal was dismissed. The Court of Appeal was able to cite numerous precedents to the effect that the creator of the nuisance is personally liable for it,[24] notwithstanding that he or she is not in occupation of the property from which the nuisance emanates, is employed or contracted by the occupier to carry out the acts in question, is powerless to abate the nuisance, and that other causes contributed to the damage. Of overriding importance was the causal connection between the excavator's act and the ultimate damage. There was no suggestion of fault on the part of the excavator, who it was said had carried out the work "properly and without negligence".[25] Justice Glass stated:

> By stressing the findings made by the trial judge that the excavator left the site with the excavation in proper condition fully expecting that the vertical sides would be retained by a wall and remained ignorant of the developer's default until the damage occurred, it can be made to appear that to hold him liable is offensive to basic notions of fairness. But the justice of this result according to law follows from two propositions. The first is that *the withdrawal of the lateral support from land is an actionable nuisance for which strict liability attaches without proof of any negligence*. The second is: "This negative duty (not to interfere with that support) is broken once for all by him who originally made the excavation, and he alone is and remains responsible for the

24. [1977] 2 NSWLR 486 at 491, 493 and 494.
25. [1977] 2 NSWLR 486 at 501, per Mahoney JA.

> consequences of his act whenever those consequences ensue" ...[26] (emphasis added)

3.14 The Court of Appeal upheld the trial judge's application of the principle of foreseeability, based on *The Wagon Mound (No 2)*, but supported the finding that the failure by the developer to erect a retaining wall was foreseeable. The consequence was that the plaintiff's damage was not remote in law from the defendant's excavation.[27]

3.15 As Justice Glass acknowledges in the passage quoted above, the law in this area can pose a challenge to "basic notions of fairness". One commentator notes:

> [P]ure strict liability, shorn of negligence, …[is] not only morally inadequate, paying as it does crucially insufficient attention to the avoidability of injury ... Strict liability, more important still, never succeeds in offering more than a logically vulnerable theory, especially in relation to the defendant's creation of dangerous conditions resulting in harm, precisely because the creation of such danger cannot in the end be divorced from a defendant's foreknowledge or foresight or the lack of it; a theory of strict liability which, by its very definition, eschews all considerations of negligence is … not really workable.[28]

3.16 As well as the moral objection that may be taken against a strict liability regime, there may be economic factors to take into account. In *Blewman v Wilkinson*,[29] Justice Cooke of the New Zealand Court of Appeal, while specifying that his comments were made in the context of the local topography, stated:

> The idea of imposing strict liability on a subdividing owner when a subsidence occurs perhaps many years later, and notwithstanding that he acted on proper professional advice at the time, is unattractive. Unless he or his agents can be shown to have been at fault it seems to me more just to leave the loss lying where it falls. Hillside subdivisions and the like are so typical in this country and slips and other subsidences such commonplace hazards that, unless fault can be

26. [1977] 2 NSWLR 486 at 493. References have been omitted.
27. [1977] 2 NSWLR 486 at 492, per Glass JA.
28. Stoljar at 2.
29. [1979] 2 NZLR 208.

> demonstrated, a purchaser can fairly be expected to accept the risk. Insurance (if any) should be his concern.[30]

3.17 While this case was dealing with a subdivision, Bradbrook and Neave, in *Easements and Restrictive Covenants in Australia*, maintain that the principles enunciated by the New Zealand Court of Appeal could be used to attack the validity of the principle of strict liability in *any* case of withdrawal of support, and add "[i]t may be that future courts will determine the liability of the original excavator in all situations on the issue of negligence and will refuse to apply the concept of strict liability."[31] We will turn to the subject of negligence shortly.

BREACH OF STATUTORY DUTY

3.18 It was noted in the previous chapter[32] that regs 33 and 34 of the *Local Government (Approvals) Regulation 1993* insert conditions into every approval to erect a building, requiring that measures be taken to prevent soil movement or damage to buildings on adjoining land. Failure to comply with these conditions:

1. attracts a penalty, as specified in the principal Act; and

2. may be restrained or remedied by any person by an application to the courts.

3.19 In *Anderson v Mackellar County Council*[33] the New South Wales Court of Appeal held that provisions in the *Local Government Act 1919* (NSW) and Ordinances made pursuant thereto created private rights and obligations between a "building owner" and an adjoining owner, conferring upon the adjoining owner a cause of action for breach of statutory duty. In particular, s 318(8) of the *Local Government Act 1919* gave power to make Ordinances "defining the respective rights duties and obligations of owners and occupiers of adjoining buildings or lands in relation to external walls, party walls" and so on. Further, s 318(17) conferred the power to make Ordinances which relate specifically to the underpinning and shoring of adjoining buildings.

30. [1979] 2 NZLR 208 at 212.
31. A J Bradbrook and M A Neave *Easements and Restrictive Covenants in Australia* (Butterworths, Sydney, 1981) at 136.
32. at paras 2.9-2.11.
33. (1968) 69 SR (NSW) 444.

However, even had such an inference been lacking, Justice Jacobs observed that he could find no "context of the legislation to the contrary of any intention to create private rights".[34]

3.20 Although *Anderson* was concerned with the former clause 44 of Ordinance 71, the later decisions in *Kebewar Pty Ltd v Harkin*[35] and *Pantalone v Alaouie*[36] held that the same principles applied in relation to its successor, Pt 31.4 of Ordinance 70.

3.21 The approach adopted in regs 33 and 34 makes further consideration of the issue of breach of statutory duty unnecessary. This is because the obligations set out in regs 33 and 34 are not imposed directly as obligations arising under the Regulations. Rather, the obligations arise by way of conditions of an approval to erect a building under the *Local Government Act 1993* (NSW).

3.22 In addition, the legislature has provided specific criminal and civil sanctions for a breach of those conditions of approval.[37] In light of these specific provisions, contained as they are in such a recent expression of the views of the legislature, the Commission does not propose any amendment to regs 33 and 34.

THE RULE IN DALTON V ANGUS

3.23 If the prevailing law on the right to support can sometimes lead to an overly favourable result for the plaintiff owner of collapsed land at the expense of a morally innocent defendant, it also has the potential to leave the plaintiff owner of a collapsed *building* with little or no redress. At this point it is worth reiterating the words of Lord Penzance which we quoted in the previous chapter:

> ... [I]t is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent

34. (1968) 69 SR (NSW) 444 at 448.
35. (1987) 9 NSWLR 738.
36. (1989) 18 NSWLR 119 at 131.
37. *Local Government Act 1993* (NSW) ss 627, 673 and 674.

> soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground.[38]

3.24 These words dramatically illustrate one of the central shortcomings in an area of law ill-equipped to deal with modern urban realities, and an anachronism with regard to modern developments in the law. *Dalton v Henry Angus & Co* (hereinafter referred to as *Dalton*) is the leading case on the law of support for buildings from adjacent land. It is authority for the proposition that buildings or structures, "artificially imposed upon land", are not entitled to such support without prescription or grant.[39] While the principles established in *Dalton* continue to apply in New South Wales, a number of judges have indicated dissatisfaction with the state of the law, such as Justice Stephen, who observed (in *Stoneman v Lyons*) that "the rule in *Dalton v Angus* is clearly ill-adapted to conditions in modern cities".[40]

3.25 As noted in DP 27, New Zealand took the opportunity to abandon *Dalton* almost a quarter of a century ago in *Bognuda v Upton & Shearer Ltd*.[41] The New Zealand Court of Appeal characterised *Dalton* as a decision founded on the acquisition of a right to support by prescription, which was no longer available in New Zealand. Having thus disposed of *Dalton*, Justice North could "see no reason why the range of negligence which was greatly extended in *Donoghue v Stevenson* ... should not be applied in this field".[42] Consequently, the Court found that the defendant excavator had owed the plaintiff a duty to exercise reasonable care for the protection of the latter's wall.

3.26 Although the High Court felt constrained from following New Zealand's example by the fact that prescriptive easements could, in theory, be acquired in Australia, nevertheless Justice Stephen stated obiter in *Stoneman v Lyons*:

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38. *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 at 804, per Lord Penzance.
39. (1881) 6 App Cas 740 at 792, per Lord Selborne.
40. (1975) 133 CLR 550 at 567. See also *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1988) 4 BPR 9640; *Pantelone v Alouie* (1989) 18 NSWLR 119.
41. [1972] NZLR 741.
42. [1972] NZLR 741 at 757. References have been omitted.

> … I regard it as at least arguable that, as the law of negligence now stands, the threatened burdening of land with an easement of support in favour of a building next door does not entail the consequence that the owner of the land thus threatened may excavate up to his own boundary regardless of the effect upon his neighbour's building.[43]

3.27 In *Pantalone v Alaouie*[44] the plaintiff owned a property at No 310, on which stood a building housing a flat and a restaurant, both of which were tenanted. The defendant owned vacant land at No 312, on which excavation work was commenced for the purpose of erecting a building. To this end the defendant engaged an engineer and a backhoe operator. As a result of the excavation work the building at No 310 collapsed. The plaintiff claimed against the defendant, the engineer and the backhoe operator on a number of grounds, not all of which we propose to deal with here.

3.28 With respect to the common law right of support, the Court found that the soil would have collapsed even if there had been no building on No 310 exerting additional pressure, but, because the evidence for that finding was not admitted against the defendant, the plaintiff could not succeed against him on this ground.[45] Applying *Fennell v Robson Excavations Pty Ltd*[46] the Court held that, while liability in nuisance normally attaches to the occupier, it may also be incurred by someone creating a nuisance on land in the occupation of another. On this basis the backhoe operator was liable as the creator of the nuisance, but not the engineer.

3.29 The defendant was held liable under the statutory duty imposed by Pt 31.4 of Ordinance 70, predecessor of the current Reg 34[47]. The defendant and the backhoe operator having thus already been found liable, it was unnecessary for the court to consider their liability in negligence.

3.30 With respect to negligence, the Court found that as between the engineer and the plaintiff, there was such a relationship of proximity as to give rise to a duty of care owed by the former to the latter. As the engineer drew the plans and knew of the imminent danger of collapse and the limits of his client's experience in relation to excavating, he was held to be in breach of that duty and liable in negligence, notwithstanding that the defendant who

43. *Stoneman v Lyons* (1975) 133 CLR 550 at 567.
44. (1989) 18 NSWLR 119.
45. (1989) 18 NSWLR 119 at 129.
46 [1977] 2 NSWLR 486.
47 discussed at para 2.9**.**

had hired him may have been under no duty of care to the plaintiff.[48] On this last point Justice Giles commented:

> I return then to what may be called the *Dalton v Henry Angus & Co* point. As acknowledged by Stephen J in *Stoneman v Lyons* ... , the rule in [*Dalton*] is "clearly ill-adapted to conditions in modern cities". If it prevents the recognition of a duty of care owed by one owner to an adjoining owner, I do not see why it should be given a wider effect so as to prevent a duty of care being owed by someone other than the owner of land. A negligent driver who knocks down the wall of a building will be liable to the building owner. As long ago as 1850 it was held that a stranger who removed support to land could be liable where he would not be liable had he been the adjoining owner: *Jeffries v Williams* (1850) 5 Exch 792. In my view a negligent engineer in the position of Mr Mourad can also be so liable. If the owner of land can excavate negligently on his land, that must be regarded as an anomaly founded upon the primacy given to the incidents of ownership of land.[49]

3.31 This case illustrates the piecemeal nature of the law in this area, where, due to the "anomalies" to which Justice Giles refers, various defendants are subject to liability arising out of the same incident, but under different regimes, for what appear to be quite arbitrary reasons. Similar thoughts to those of Justices Giles and Stephen are echoed by Justice Richardson in *Blewman v Wilkinson*[50]. He says:

> As D M Campbell J pointed out in *Thynne v Petrie* [1975] Qd R 260, the law concerning rights to lateral and subjacent support took shape in the second half of the last century, before the development of the concept of tortious negligence. The action for negligence has clearly expanded into this field and a landowner proposing to develop his land for subdivisional purposes owes a duty to subsequent purchasers to take reasonable care to ensure that the development is properly planned and carried out. The contractors and professional advisers concerned in the subdivision also have their own responsibilities in negligence. That being so a further remedy, particularly one imposing absolute liability, should not, in my view, be provided by the Courts by way of

48. (1989) 18 NSWLR 119 at 134-136.
49. (1989) 18 NSWLR 119 at 135-136.
50. [1979] 2 NZLR 208.

> extension of 19th century property rights unless clearly called for by the social conditions of today.[51]

The foregoing comments and our earlier discussion of nuisance and its shortcomings have alluded repeatedly to negligence principles, and it is to this topic we now turn.

NEGLIGENCE

3.32 The maxim most often employed in connection with the right to support, and nuisance generally, is *sic utere tuo ut alienum non laedas*, or "so use your own property as not to injure another's". This might be regarded as the "good neighbour" principle of nuisance, and is concerned with balancing competing uses of land. Its focus is the protection of a particular *interest*.[52] Of greater significance this century has been the "good neighbour" principle of negligence, laid down in the landmark case of *Donoghue v Stevenson* in which Lord Atkin stated:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[53]

3.33 Here the emphasis is on the defendant's *conduct*.[54] Many of the comments by judges and academics quoted in this chapter have indicated that negligence, rather than nuisance, is the preferable realm in which the right to support should operate.

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51. [1979] 2 NZLR 208 at 214. With respect to Richardson J's comments regarding the expansion of negligence to take into account subsequent purchasers, see *Bryan v Maloney* (1995) 182 CLR 609 (HC).
52. R A Buckley *The Law of Nuisance* (Butterworths, London, 1981) at 3.
53. [1932] AC 562 at 580.
54. Buckley at 3.

Physical versus non-physical damage to land

3.34 The "classic" nuisance action concerned non-physical damage to land, that is, interference with the enjoyment of land through an intangible, most commonly noise or smell.[55] Nuisance has been referred to as an environmental tort,[56] and some commentators have suggested that it still has a valuable role to play in the area of environmental protection. One commentator argues that categorising physical harm as private nuisance is anomalous because it was once the province of negligence. Returning it there will free nuisance to focus on protecting occupiers against non-physical interference with the enjoyment of their land.[57] In similar vein, Fleming states that nuisance performs a function complementary to modern day development controls, but that this role has become obscured by being extended to cover situations involving physical damage.[58] Linden also refers to the role of nuisance in environmental protection as complementing an imperfect legislative system.[59]

3.35 The fact that cases of physical damage to land have occasionally been characterised as instances of nuisance can be attributed to the confusion that has long existed in this area. Treatment of the subject of nuisance in textbooks rarely makes a distinction between these kinds of damage. A trend has, however, emerged to treat cases of physical injury to land as properly pertaining to negligence. For example, in the judgment of the majority of the High Court in *Burnie Port Authority v General Jones Pty Ltd* it was stated:

> ... ordinary negligence has progressively assumed dominion in the general territory of tortious liability for unintended physical damage, including the area in which the rule in *Rylands v Fletcher* once held sway.[60]

Similarly, Fleming comments:

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55. C Gearty "The Place of Private Nuisance in a Modern Law of Torts" (1989) 48 *Cambridge Law Journal* 214 at 217 and 229; Buckley at 22.
56. A M Linden *Canadian Tort Law* (5th ed, Butterworths, Toronto, 1993) at 510.
57. Gearty at 218.
58. J G Fleming *The Law of Torts* (8th ed, Law Book Co, Sydney, 1992) at 409.
59. Linden at 505.
60. (1994) 179 CLR 520 at 541.

> [Negligence] has been imperceptibly displacing nuisance as the appropriate basis of liability for physical harm, especially in cases of isolated (as distinct from continuing) occurrences ... it might be better now to exclude all physical harm from the province of nuisance.[61]

3.36 In support cases, the gist of the action is physical damage, or the threat of it, generally occasioned by an isolated unintentional event, rather than an ongoing state of affairs. In this regard it more closely resembles negligence than a typical nuisance case such as emission of noxious fumes from a factory.

3.37 In the recent case of *Hunter v Canary Wharf Ltd*,[62] the House of Lords held it to be established law that an action in private nuisance is based on the plaintiff's right to the enjoyment of his or her land, and that interference with that right "will generally arise from something emanating from the defendant's land [such as] noise, dirt, fumes, a noxious smell, vibrations, and suchlike".[63] Furthermore, a majority held that, in general, only a person with a proprietary interest in the land can sue. Extending the category of persons entitled to sue "would transform [nuisance] from a tort to land into a tort to the person, in which damages could be recovered in respect of something less serious than personal injury and the criteria for liability were founded not upon negligence but upon striking a balance between the interests of neighbours in the use of their land".[64] This, in Lord Goff's view, is an unacceptable way to develop the law. This decision is consistent with a view that in cases concerned with loss or damage caused by removal of support, negligence provides a more appropriate remedy than nuisance.

LIABILITY FOR INDEPENDENT CONTRACTORS

3.38 Vicarious liability, in which one person is held to account for the wrongdoing of another, is a type of strict (in the sense of no-fault) liability.[65] In Australia, it applies in employment situations, where an employer is held vicariously liable to third parties for tortious acts of an employee which are within the scope of the employee's authority and committed within the course

61. Fleming at 409-410.
62 [1997] 2 WLR 684.
63 [1997] 2 WLR 684 at 689, per Lord Goff of Chieveley.
64 [1997] 2 WLR 684 at 696, per Lord Goff of Chieveley.
65. Fleming at 366.

of the latter's employment.[66] In general, a principal will *not* be held vicariously liable for the tortious acts of an independent contractor.[67] Various criteria are used to distinguish between a contract of service or employment (between employer and employee) and a contract for services (between principal and independent contractor), but these are not our concern for present purposes.

3.39 The English case of *Bower v Peate*[68] established the principle that a landowner is liable for the acts of an independent contractor which deprive neighbouring land of support. In his judgment Chief Justice Cockburn stated:

> ... a man who orders a work to be executed, *from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented*, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else - whether it be the contractor employed to do the work from which the danger arises or some independent person - to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventative measures are adopted.
>
> ... It is true ... the removal of the soil, to the support of which an adjacent building or land may be entitled, is not in itself wrongful, and becomes so only when damage to the adjoining property results; whence it follows that if by artificial means of support the damage can be prevented, no cause of action arises. But it is equally clear that if effectual means of prevention fail to be applied, and damage once results, the act of removal becomes wrongful, and an action can be at once maintained.
>
> In the present instance preventative measures adequate to the occasion having failed to be provided, the removal of the soil was followed by actual damage to the plaintiff's house, and the act of removal was therefore wrongful as causing a wrong done to the plaintiff. But the act of removal was an act done by the order and authority of the

66. *Halsbury's Laws of Australia* (Butterworths, Sydney, 1992) vol 10 at 310,522.
67. *Halsbury's Laws of Australia* vol 10 at 310,525.
68. (1876) 1 QBD 321.

> defendant - in other words, was the act of the defendant; and no man can get rid of liability for injury occasioned to another by a wrongful act by seeking to throw the responsibility on an agent whom he has employed to do the act.[69] (emphasis added)

3.40 Atiyah regards support cases as being in a class of their own, rather than coming within the purview of nuisance with respect to liability for independent contractors.[70] Nevertheless, he states that a number of English cases, based on the "dangerous operations" doctrine enunciated in *Bower v Peate*, affirm liability in nuisance for the acts of independent contractors. For example, in *Alcock v Wraith*[71] Mr and Mrs Swinhoe hired an independent contractor, Wraith, to carry out re-roofing works to their terrace house. The roof extended over a number of houses, uninterrupted by the party walls between the neighbouring properties. Alcock owned the adjoining property, and noticed damp in a first floor room. A survey revealed that the tiles used in the re-roofing had encroached slightly over the party wall dividing the properties, and that the contractor had removed slates from Alcock's roof, destroying the overlap between the remaining slates allowing moisture to penetrate. The contractor was subsequently adjudged bankrupt. At both the trial and subsequent appeal the Swinhoes were held liable to Alcock in trespass, nuisance and negligence. It was held that while there was a general rule that an employer is not liable for the torts of an independent contractor, there was an exception where there existed a special risk or where the work from its very nature is likely to cause danger or damage. In the present case the Court decided the question of special risk in favour of the plaintiff on the basis of evidence which had stated that it was notoriously difficult to make a waterproof joint between slates and tiles.[72] Furthermore, while the Swinhoes were entitled to have work done on the joint between the two roofs, if they exercised that right they were under a duty to see that reasonable skill and care were used in the operation, and that duty could not be delegated to an independent contractor.

3.41 In Australia, courts have been reluctant to follow the English precedent. *Torette House Pty Ltd v Berkman*[73] was a nuisance case in which

69. (1876) 1 QBD 321 at 326-327.
70. P S Atiyah *Vicarious Liability in the Law of Torts* (Butterworths, London, 1967) at 355-56.
71. *The Times* (23 December 1991).
72. *The Times* (23 December 1991) at 22.
73. (1940) 62 CLR 637.

the defendant employed as an independent contractor a plumber who, in the course of his work, mistakenly turned on a stopcock which allowed water to escape and cause considerable damage to the plaintiff's property. An appeal from the Supreme Court of New South Wales was dismissed by the High Court, which held that the plaintiff had no cause of action against the defendant in either nuisance or under the rule in *Rylands v Fletcher*. The defendant had not caused the nuisance, nor did he employ the plumber "to do any act of which the nuisance was the necessary or a natural consequence".[74] Nor was there considered to be any ground upon which a principal could be held liable for the negligence of an independent contractor, because, as Chief Justice Latham stated:

> The ordinary employment of a competent plumber to repair a water service, which almost invariably involves turning the water supply off and on, cannot be regarded as an extra-hazardous or inherently dangerous operation ... involving special danger of damage to others.[75]

3.42 The High Court, in *Stoneman v Lyons*,[76] questioned the existence at common law of a doctrine of extra-hazardous activity, and settled the matter in *Stevens v Brodribb Sawmilling Co Pty Ltd*,[77] where it was stated that the doctrine of extra-hazardous acts, whereby an exception is said to arise to the general rule that a principal is not liable for the negligence of his independent contractor, "has no place in Australian law".[78] Interestingly, in the recent case of *Burnie Port Authority v General Jones Pty Ltd*[79] the majority of the High Court, in discussing the concept of the "non-delegable" duty, referred to its previous decision in *Kondis v State Transport Authority*,[80] and "certain categories of case" in which it would not suffice to discharge the duty of care merely by hiring a competent independent contractor. In such cases a duty of care of a special and more stringent type arose, a "duty to ensure that reasonable care is taken". An example of such a non-delegable category is "adjoining owners of land in relation to work threatening support or common walls". The element common to most of the categories enumerated was said to be "the central element of control", marked by special dependence or

74. (1940) 62 CLR 637 at 646, per Latham CJ.
75. (1940) 62 CLR 637 at 648.
76. (1975) 133 CLR 550 at 563 and 575.
77. (1986) 160 CLR 16.
78. (1986) 160 CLR 16 at 30.
79. (1994) 179 CLR 520.
80. (1984) 154 CLR 672.

vulnerability.[81] The type of case envisaged might be one in which a defendant is in control of premises, and has taken advantage of that control to introduce thereon a dangerous substance or activity. The plaintiff is a person outside the premises and without control over what takes place, but whose person or property is thereby exposed to a foreseeable risk of danger. The latter is therefore in a position of special vulnerability and dependence. The consequence is that the defendant is under a duty of care which "varies in degree according to the magnitude of the risk involved and *extends to ensuring that such care is taken*".[82]

3.43 In *Kondis*, in a discussion concerning non-delegable duties, the Court referred to *Dalton v Angus* and the following statement of Lord Blackburn:

> [A] person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.[83]

3.44 Justice Mason regarded the liability of the landowner and contractor in *Dalton* for the actions of the subcontractor which caused subsidence on adjoining land as arising from their personal duty to see that care was taken not to interfere with the neighbour's right of support.[84] He said:

> In a number of cases a person has been held liable for damage caused through the interference with the rights of an adjoining landowner due to the negligence of an independent contractor. ...In such cases it may well be that the courts proceeded according to a view, which they did not express, that the relationship of the parties as adjoining landowners was such that the rights of one necessarily involved a correlative duty on the part of the other, when authorising work which might interfere with those rights, to ensure that reasonable care and skill was exercised rather than a duty merely to exercise reasonable care and skill which in many instances might be satisfied by the appointment of a competent contractor.[85]

81. (1994) 179 CLR 520 at 550-551.
82. (1994) 179 CLR 520 at 551 and 557 (emphasis added).
83. (1881) 6 App Cas 740 at 829.
84. (1984) 154 CLR 672 at 682.
85. (1984) 154 CLR 672 at 685.

3.45 Justice Mason proceeded to give examples of situations which generate a special responsibility or duty to see that care is taken, stating:

> In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised. As we have seen, the personal duty which has been recognised in the other cases which I have discussed, such as *Dalton v Angus*, may rest on rather different foundations which have no relevance for the present case.[86]

3.46 It seems, therefore, that support cases may constitute a discrete category in which a principal will be held vicariously liable for the torts of an independent contractor. Regardless of whether such liability arises as a result of support cases constituting a class of their own or a sub-class of nuisance, Atiyah does not consider the result unjust:

> There is a good deal to be said for the view that a person should be liable in nuisance for damage caused to his neighbour by the way his premises have been used, whether the actual negligence is his or that of an independent contractor, or indeed, a member of his household. If the negligent contractor can in fact pay for the damage, well and good, for the householder will have a right to an indemnity from him. But if the contractor cannot pay, or if he cannot be traced ... , it is hard to believe that the sense of justice of the average man would be shocked by imposing liability on the owner or occupier of the property. ... Moreover, from the point of view of spreading the loss by insurance, it may well be that the most appropriate person to bear the loss is the householder. There is no difficulty in insuring against such liabilities by means of a householder's comprehensive insurance policy ... .[87]

3.47 Fleming takes the contrary view, saying that as the contractor will be liable to third parties, and as the principal would be entitled to an indemnity from the contractor, vicarious liability in effect calls upon the principal to guarantee the contractor's ability to meet the claim. This, he says, "is apt to bear harshly on individuals who, like many a home owner, are both uninsured

86. (1984) 154 CLR 672 at 687.
87. Atiyah at 357.

and unable to pass on the cost".[88] This is another aspect of the law of support worthy of consideration, and possibly in need of clarification.

88. Fleming at 390.

4. Reform of the law of support

- Options proposed in DP 27
- The Commission's approach
- Liability based on negligence
- The commission's recommendations

OPTIONS PROPOSED IN DP 27

4.1 Discussion Paper 27 concluded with the following options for consideration:

1. amendment of Part 31.4 of Ordinance 70 of the *Local Government Act 1919* (NSW) (replaced by Regulation 34 of the *Local Government (Approvals) Regulation 1993* (NSW)); or

2. the introduction into the *Real Property Act 1900* (NSW) of a provision similar to s 179 of the *Property Law Act 1974* (Qld).

Section 179 provides as follows:

> For the benefit of all interests in other land which may be adversely affected by any breach of this section, there shall be attached to any land an obligation not to do anything on it which will withdraw support from any other land or from any building, structure, or erection which has been placed upon it.

This section seeks to extend protection to buildings threatened with a loss of support, regardless of whether that support is derived from land, water or otherwise.

4.2 Submissions received unanimously favoured amending the law of support, and, for the most part endorsed both the proposals set out above, particularly the second, although with the suggestion that the *Conveyancing Act 1919* (NSW) might be a more appropriate home for such a provision so as not to exclude Old System title. Submissions from the Commercial Law Association of Australia and the Law Council of Australia expressed the view that principles of negligence ought to play some part in determining liability. As well, some submissions called for the right to support to be extended to include support by water.

THE COMMISSION'S APPROACH

4.3 The fundamental problems with the law of support, as discussed in the preceding Chapter, may be summarised as follows:

- the common law right of support, as it now stands, extends only to land in its natural state, and does not extend to buildings or other improvements;

- there is not at present a right to support by water;

- the defendant is strictly liable in nuisance, without proof of negligence, which offends against the common notion that liability should be fault-based, and is out of step with developments this century in the law of negligence;

- it is an anomaly that the rights of the victim differ according to the nature of improvements on his or her land;

- the history and terminology of the tort of nuisance are subject to confusion, which can cause uncertainty in applying the law in support cases: for example, should nuisance apply in cases of continuing interference with enjoyment of land as well as isolated cases, and should it apply to both physical and non-physical damage?

4.4 The tentative proposals set out in para 4.1 deal with some of these, mainly the problems associated with providing adequate support for buildings and other structures. They do not deal adequately with the concerns raised in the previous chapter regarding the fair apportionment of liability. The Commission now considers that a more thoroughgoing reform than that previously proposed should be adopted. One possibility is the formulation of a comprehensive code. The disadvantage of this course, however, is the difficulty in anticipating every variation that problems in this area may take, and providing for their remedy.

4.5 The Commission has formed the view that reform of the law of support should be effected by abolishing recourse to the tort of nuisance, and in its place providing for a common law right of action in negligence. This would entail the enactment of statutory provisions to alter the existing law and define the elements the Commission wishes the new law to embody.

LIABILITY BASED ON NEGLIGENCE

4.6 The Commission considers that the objectives of reform of the law in this area should be:

1. abolition of the rule in *Dalton v Henry Angus & Co*,[1] and
2. establishment of a regime of liability based on negligence.

4.7 The issues relating to rights of support from adjoining land are wider than those canvassed in *Dalton v Henry Angus & Co*, so the Commission considers that it would not be sufficient simply to provide that the rule established in that case no longer applies. As well, abolition of that rule may have unintended consequences for rights associated with ownership of land. As a result of decisions including *Burnie Port Authority v General Jones* Pty Ltd[2] general principles of negligence will already apply to actions of a person that cause damage to neighbouring land through the escape of hazardous substances. The reforms that the Commission proposes relate only to compensation for damage caused by removal of support of land or buildings.

4.8 The suggested reform is intended to replace the common law right to support as an incident to land, with an obligation on the person to take reasonable care that he or she does not do or omit to do anything to land which might cause loss or damage by removing support provided by that land to other land. For this purpose, the supporting land includes the natural surface of the land, the subsoil, subterranean water, and reclaimed land, but does not include man-made structures on that land, except to the extent that those structures replace the support provided by the supporting land in its natural state. With respect to buildings it is not intended to create rights for support where none presently exist, except in so far as such rights would exist but for the rule in *Dalton v Angus*. Therefore, if a building is supported by a building erected on adjoining land, without a registered easement for support, the owner of the supported building will not be able to claim compensation if the supporting building is demolished, altered or not properly maintained. If, however, a building receives support from adjoining land, and the excavation or other use of that land results in a loss of actual or potential support which is reasonably foreseeable, the owner of the building may claim compensation for loss or damage from the person whose act or omission causes the loss of support. The same result could be reached if the land's ability to support new buildings which might reasonably be expected to be built were reduced.

4.9 As the remedy in nuisance would be abolished under the suggested reform, the Commission considers it prudent to create a duty of care by

1. (1881) 6 App Cas 740.
2. (1994) 179 CLR 520.

statute, even though it is arguable that a duty of care would be placed by the general law on the owner or occupier of supporting land.

4.10 The advantages of a negligence-based system of liability are as follows:

- the right to support is no longer an incident of the land itself, and can, therefore, be actionable against anyone failing to exercise reasonable care;

- the right is not confined to land in its natural state;

- the flexibility of the common law is retained, so as to encompass a wide variety of fact situations and remedies;
- a duty of care between neighbouring landowners is established, consistent with principles developed throughout the century; and

- liability for damage to land and structures can be apportioned according to fault, in accordance with basic notions of fairness.

4.11 The Commission does not wish to restrict the ability of landowners to make contractual arrangements between themselves concerning rights of support. Such arrangements, however, can only be enforced as between the parties to the contract. So as to protect the rights of those parties, and to ensure that subsequent purchasers of the land have notice of these arrangements, the Commission recommends that s 181A of the *Conveyancing Act 1919* be amended to provide for the creation (and thus the registration under the *Real Property Act 1900*) of an "easement to remove support".

4.12 A draft Bill giving effect to the Commission's recommendations is Appendix B to this Report.

THE COMMISSION'S RECOMMENDATIONS

RECOMMENDATION 1
Commission recommends inserting into the *Conveyancing Act 1919* (NSW), and such other legislation as may be necessary, provisions giving effect to the following:

1. The abolition of the right of any person to bring a common law action in nuisance in respect of a reduction in support for any land.

2. **Everyone must take reasonable care that they do not do or omit to do anything on or in relation to land which might cause loss or damage by removing support provided by that land to other land.**

3. **For this purpose "land" includes the natural surface of the land, the subsoil and any subterranean water, and reclaimed land, but does not include man-made structures on that land, except to the extent that those structures replace the support provided by the supporting land in its natural state.**

4. **If those with interests in land agree among themselves to exclude, restrict or modify the duty of care, they may register that agreement in ways that bind their successors in title to the land by means of an "easement to remove support".**

Features of a proposed right to support in negligence

Duty of care

4.13 The proposed right to support in negligence would create a duty of care, imposed upon any person (not necessarily the owner of the land) carrying out or involved in an activity, or omitting to do anything having an effect on land in favour of all persons enjoying the ownership or use of any other land This duty of care prohibits any activity which:

1. damages the affected land;

2. renders the affected land, including any structures on it, unsafe; or

3. renders the affected land unable to support safely any structures which may foreseeably be erected on it in the future.

Foreseeability

4.14 In contrast with s 179 of the *Property Law Act 1974* (Qld), the proposed duty of care will not prohibit every withdrawal of support. It seems likely that some degree of loss of support could result, for example, from changes to other land, but in the Commission's view these should not be actionable if they are of a trivial nature and do not cause any damage to affected land. The duty is limited by the concept of foreseeability which will take circumstances such as the prevailing land use into account. For example, it is not intended that construction of a residence in a predominantly residential area will entail an obligation to maintain support to neighbouring land sufficient to carry the burden of multi-storey buildings which, as a technical possibility, might be built there at some time in the future.

Structures built below land surface

4.15 The proposed reform is not intended to give rise to a right to support by a building or other structure, except where the supporting building or other structure replaces the support provided by the land in its natural state. In such cases the supporting building or structure will be subject to the same obligation as would have existed if that land had been left in its natural state.

No need for common boundary

4.16 The parcels of land need not have a common boundary for a right to support to arise. There may, for example, be a corridor of land between the two lots, but this will not prevent an obligation to take care not to remove support arising.

Support agreements

4.17 Where an occupier of land proposes to use the land in ways which might be reasonably foreseen to cause damage to other land, it may be necessary for the occupier to make an agreement with those having an interest in the land affected. Such an agreement might, by analogy, "run with the land" in the way an easement does. Neither the *Conveyancing Act 1919* (NSW) nor the *Real Property Act 1900* (NSW) currently provide for the registration or enforcement of "support agreements" other than easements for support under the *Real Property Act 1900*, and it will be necessary to insert provisions in these Acts for this purpose. Support agreements will be necessary or convenient in circumstances where there is doubt as to pre-

existing natural surface levels, or where substantial alteration to the natural surface levels of the different parcels of land has occurred or is proposed.

Applicable to all forms of title

4.18 The reform should apply to all land, irrespective of the title system involved. For this reason, the principal proposed statutory provision should be inserted into the *Conveyancing Act 1919* (NSW).

Persons owing duty of care

4.19 The proposed duty of care will be imposed on any person performing, or concerned in, the relevant prohibited activity and will be owed to any person enjoying the use of the affected land.

Independent contractors

4.20 The recommended reform is not intended to alter the existing law in regard to the liability of principals for the acts of their independent contractors.

RECOMMENDATION 2
The Commission recommends that a provision be inserted into the *Local Government Act 1993* (NSW) stating that the breach of certain Regulations made pursuant, and listed in a Schedule, to the Act shall not give rise to any private right of action. It is further recommended that Regulations 33 and 34 of the *Local Government (Approvals) Regulation 1993* (NSW) be listed in the relevant Schedule.

Private rights of action arising from breach of statutory duty

4.21 The Commission is of the view that the rationale for the reforms contained in Recommendation 1 would be undermined if a plaintiff could elect to pursue a private right of action ensuing from the breach by the defendant of Regulation 34 of the *Local Government (Approvals) Regulation 1993* (NSW). Such a plaintiff could bypass the recommended requirement to prove negligence, for, in theory, the plaintiff may be called on to do no more than demonstrate that a breach has occurred in order to recover. This would represent a return to a strict liability regime in certain cases, an outcome the Commission opposes for the reasons set out in the previous chapter. It would also have the effect of preserving the current anomaly in allowing different rights of action depending on the nature of improvements on the land.

APPENDIX A: SUBMISSIONS RECEIVED

1. Australian Institute of Building Surveyors, NSW Chapter
2. Mr James Baxter
3. Assoc Prof Peter Butt, consultant, Mallesons Stephen Jaques, solicitors
4. The Commercial Law Association of Australia Ltd
5. Law Council of Australia
6. The Law Society of New South Wales
7. New South Wales Board Of Surveyors
8. New South Wales Department of Local Government and Co-operatives
9. New South Wales Land Titles Office

Appendix B: Conveyancing Amendment (Law of Support) Bill 1997

Conveyancing Amendment (Law of Support) Bill 1997

Explanatory note

Overview of Bill

Generally under the common law, the owner or occupier of a parcel of land has a “natural right”' not to have the support of that land removed by the owner or occupier of an adjoining (or neighbouring) parcel of land. This common law natural right of support is distinct from a right to support that is acquired by easement. If it is infringed and damage has been caused to the supported land, an action lies in nuisance.

The object of this Bill is to reform this area of the law by providing that an infringement of the right to support is actionable in negligence and not in nuisance. Accordingly, a common law duty of care is established. The duty of care, based on the common law of negligence, is not to do anything that will result in the removal or reduction of support to other land. This reform is achieved by an amendment to the *Conveyancing Act 1919.*

This Bill also provides that a breach of the conditions specified under the *Local Government (Approvals) Regulation 1993* in relation to retaining walls and support for neighbouring buildings will not give rise to any private right of action. The failure to comply with the conditions of a local council's building approval is dealt with under section 627 of the *Local Government Act 1993*.

This Bill gives effect to the recommendations made by the New South Wales Law Reform Commission in its report entitled *The Right to Support from Adjoining Land*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendment to the *Conveyancing Act 1919* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Local Government (Approvals) Regulation 1993* set out in Schedule 2.

Schedule 1 amends the *Conveyancing Act 1919* for the purposes described in the above overview.

Schedule 2 amends the *Local Government (Approvals) Regulation 1993* for the purposes described in the above overview.

Contents

Conveyancing Amendment (Law of Support) Bill 1997

No , 1998

A Bill for

An Act to amend the *Conveyancing Act 1919* to reform the law relating to the right to support for land; to amend the *Local Government (Approvals) Regulation 1993* for related purposes; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Conveyancing Amendment (Law of Support) Act 1997*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Conveyancing Act 1919 No 6

The *Conveyancing Act 1919* is amended as set out in Schedule 1.

4 Amendment of Local Government (Approvals) Regulation 1993

The *Local Government (Approvals) Regulation 1993* is amended as set out in Schedule 2.

Schedule 1 Amendment of Conveyancing Act 1919

(Section 3)

[1] Section 177

Insert before section 178:

177 Duty of care in relation to support for land

(1) For the purposes of the common law of negligence, a duty of care exists in relation to the right of support for land.

(2) Accordingly, a person has a duty of care not to do anything, or not to omit to do anything, on or in relation to land (***the supporting land***) so as to cause damage by removing the support provided by the supporting land to any other land (***the supported land***).

(3) For the purposes of this section, ***supporting land*** includes the natural surface of the land concerned, the subsoil of the land, any water beneath the land, and any part of the land that has been reclaimed.

(4) The duty of care in relation to support for land does not extend to any support that is provided by a building or other structure on the supporting land except to the extent that the supporting building or structure concerned has replaced the support that the supporting land in its natural or reclaimed state formerly provided to the supported land.

(5) The duty of care in relation to support for land may be excluded or modified by express agreement between a person on whom the duty lies and a person to whom the duty is owed. Any such agreement has no effect in relation to any successor in title of the supported land unless the agreement is embodied in a registered easement for removal of support relating to that land.

(6) The right to agree to the removal of the support provided by supporting land to supported land is a kind of right that is capable of being created by an easement.

(7) Any right at common law to bring an action in nuisance in respect of the removal of the support provided by supporting land to supported land is abolished by this section.

(8) Subsection (7) does not apply in respect of any proceedings that have commenced before the commencement of this section.

(9) Subject to the operation of any limitation period for bringing an action in negligence, any action in negligence that is brought after the commencement of this section in respect of the removal of the support provided by supporting land to supported land may be wholly or partly based on anything that was done, or that was omitted to be done, before the commencement of this section.

(10) This section extends to land and dealings under the *Real Property Act 1900*.

(11) A reference in this Act to the removal of the support provided by supporting land includes a reference to any reduction of that support.

[2] Section 181A Construction of expressions used to create easements

Insert at the end of section 181A (2):
easement for removal of support

[3] Schedule 8 Construction of certain expressions

Insert at the end of the Schedule:

Part 15 Easement for removal of support

The owner of the lot benefited (being the owner of the supporting land as referred to in section 177) may:

(b) remove the support provided by the lot benefited to the burdened lot (being the supported land as referred to in section 177), and

(c) do anything reasonably necessary for that purpose.

Schedule 2 Amendment of Local Government (Approvals) Regulation 1993

(Section 4)

[1] Clause 33 Retaining walls

Insert at the end of the clause:
(2) The failure to comply with any such condition:

(b) is taken not to be a civil wrong, and

(c) does not give rise to any proceedings by a person other than the council that gave the approval concerned.

[2] Clause 34 Support for neighbouring buildings

Insert after clause 34 (1):
(1A) The failure to comply with any such condition:

(b) is taken not to be a civil wrong, and

(c) does not give rise to any proceedings by a person other than the council that gave the approval concerned.